



THE UNIVERSITY *of* EDINBURGH

Edinburgh Research Explorer

The right to vote

Citation for published version:

Stjepanovi, D & Tierney, S 2019, 'The right to vote: Constitutive referendums and regional citizenship', *Ethnopolitics*, vol. 18, no. 3, pp. 264-277. <https://doi.org/10.1080/17449057.2019.1585090>

Digital Object Identifier (DOI):

[10.1080/17449057.2019.1585090](https://doi.org/10.1080/17449057.2019.1585090)

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Peer reviewed version

Published In:

Ethnopolitics

Publisher Rights Statement:

This is an Accepted Manuscript of an article published by Taylor & Francis in *Ethnopolitics* on 6th May 2019, available online: <https://www.tandfonline.com/doi/full/10.1080/17449057.2019.1585090>.

General rights

Copyright for the publications made accessible via the Edinburgh Research Explorer is retained by the author(s) and / or other copyright owners and it is a condition of accessing these publications that users recognise and abide by the legal requirements associated with these rights.

Take down policy

The University of Edinburgh has made every reasonable effort to ensure that Edinburgh Research Explorer content complies with UK legislation. If you believe that the public display of this file breaches copyright please contact openaccess@ed.ac.uk providing details, and we will remove access to the work immediately and investigate your claim.



The Right to Vote: Constitutive Referendums and Regional Citizenship

Dejan Stjepanović^a * and Stephen Tierney^b

^a*Politics and International Relations, University of Dundee, UK and Politics and International Relations Department, University of Edinburgh, UK;* ^b*School of Law, University of Edinburgh, UK*

*Dejan Stjepanović, School of Social Sciences, University of Dundee, UK.
d.stjepanovic@dundee.ac.uk. ORCID number: <https://orcid.org/0000-0002-9192-8650>

Dejan Stjepanović is a Lecturer in Politics at the School of Social Sciences, University of Dundee and an Honorary Fellow in Politics and International Relations, SSPS, University of Edinburgh.

Funding statement (for Stjepanović): This research was supported by the National Center of Competence in Research (NCCR) –on the move funded by the Swiss National Science Foundation.

Stephen Tierney is Professor of Constitutional Theory at the School of Law, University of Edinburgh.

Abstract: This article analyses cases in which regional citizenship is an essential part of constitutional architecture either in the form of peace agreement or federal/autonomy settlement. Apart from offering a characterisation of regional citizenships, the article argues that the franchise and formal (sub-state) regional citizenry should be more closely corresponding in cases where regional citizenship forms an indispensable part of the constitutional arrangement. Importantly, while referring to some of the more complex and (what is perceived in the literature as) unusual cases, the article questions the established citizenship hierarchy where regional citizenship is considered to be derivative of national (state-level) citizenship.

Keywords: Regional citizenship, constitutive referendums, complex states.

Introduction

Rekindled demands for another independence referendum in Scotland coupled with the future of a changed constitutional setting (post-Brexit) and the (unilateral) 2017 independence

referendum in Catalonia (among other similar plebiscites in other parts of the world) bring under the academic spotlight a number of issues related to the nature of politics, centre and periphery relations and above all competing self-determination claims.

There is an on-going debate on the franchise in independence referendums based on the 2014 Scottish and 2017 Catalan cases. Two camps have evolved on the franchise issue over time - one professing the 'all-affected principle', which may well extend the franchise beyond that for ordinary elections, while the other falls back on the default regional or national election electoral roll – which is generally based upon current residence - as the basis for referendum franchise. In this article we look at cases in which regional citizenship does not only represent membership in the sub-state regional polity and/or the possession of voting rights, but in which regional citizenship is an essential part of the constitutional architecture of the state and is, consequently, demos-defining. This situation can be provided for either in the form of peace agreement (as for example in Bosnia and Herzegovina, Cyprus or Northern Ireland) or through federal/autonomy settlement (as in the Åland Islands or Montenegro).

Building on Bauböck's (2014) argument that regional citizenship is different from state-wide citizenship, and while stressing the importance of the residency-franchise nexus, here we examine plebiscites such as those on independence or EU membership as representative of a broader category of constitutive referendums as defined by Tierney (2012). Analysing constitutive referendums and the franchise in cases in which regional citizenship is a tool for accommodation of competing self-determination claims, constituting power and peoplehood, we can reach a complex and nuanced conclusion.

As we argue in this paper, it is important to: (1) distinguish between different types of regional citizenship; (2) explain its relationship to the state-wide citizenship; and (3) understand regional citizenship's congruity with the territorial blueprint of a state. Only then

can we comprehend the degree of franchise and regional citizenship entanglement within idiosyncratic political agreements.

We revisit several cases from the European context, where formally enshrined regional citizenship precedes the establishment of the internationally recognised polity and/or is an essential component of a peace agreement, and is constitutive, in one way or another, of state arrangements. The cases include the Åland Islands, Bosnia and Herzegovina, Cyprus, Montenegro and Northern Ireland among others. Apart from offering a characterisation of regional citizenships, we touch upon a normative argument, that the franchise and formal (sub-state) regional citizenry should be more closely corresponding in cases where the same regional citizenship is constitutive of state arrangements and vice-versa. Importantly, while referring to some of the more complex and (what is perceived in the literature as) unusual cases, we here question the usual hierarchy of citizenship where regional citizenship is considered to be derivative of national (state-wide) citizenship and especially in the cases where there is an obvious mismatch between state territorial structure and the citizenship hierarchy. We start with the definition of constitutive referendums, move on to the relations between regional citizenship and state architecture; and finally focus on demos-franchise relations in context.

Constitutive referendums

Referendums have proliferated widely over the past thirty years in particular. It is vital to categorise these referendums in relation to constitutional authority: referendums do not occur in a vacuum; in a sense there is no such thing as pure, unmediated direct democracy.

Referendums are always relational: to an existing or emerging constitutional order, and to the

elite actors who are institutionalised by an existing constitution or who act in a directional capacity in the creation of a new constitution.

Given this relational nature of referendums, we can begin with one important category, what we call *constitutional referendums*. This is a broad category, which we take to mean any direct citizen vote on a matter of constitutional change or constitutional creation.¹ Constitutional referendums are distinguishable from referendums held within a constitutional system to take decisions that are not matters of constitutional authority, but to influence the making of first order legal rules – examples, would be ‘initiatives’ or recall, where laws made or drafted by the legislature are put to the people for approval. What we are concerned with here however, is a further distinction within the category of constitutional referendums itself: that between what we might call *contained constitutional referendums* and *constitutive referendums*.

‘Contained constitutional referendums’ are in effect part of the ordinary constitutional amendment process, which operate either on their own or in a process of joint decision with parliament. This type of constitutional referendum takes place within, and its process and effects are determined by, existing constitutional structures. In this sense, it is entirely internal to, and contained by, the constitution.

‘Constitutive referendums’ are categorically different from contained constitutional referendums in legal-normative terms. These are instances of direct democracy deployed to

¹ The Venice Commission of the Council of Europe has defined constitutional referendums as: ‘popular votes in which the question of partially or totally revising a State’s Constitution... is asked’. European Commission for Democracy Through Law (Venice Commission), ‘Guidelines for Constitutional Referendums at National Level’ (11 July 2001) COE Doc CDL-INF(2001)10, I. See also Chapter 1 in Tierney, S., 2012. *Constitutional Referendums: The Theory and Practice of Republican Deliberation*, Oxford Constitutional Theory. Oxford: Oxford University Press; and Tierney, S., 2009. *Constitutional Referendums: A Theoretical Enquiry*. *The Modern Law Review* 72, 360–383.

create either new states or new constitutions (or both). The points of vital normative distinction is that the both the source of authority for such constitutions, and the legal-normative effect they have, are far less clear than is the case with contained constitutional referendums. Occurring as they do at the interface of an old and a new normative order, it is possible (or even unavoidable) that these be conceived as in some sense transcending the normative authority of the existing order. In playing a part, possibly the decisive part, in supplanting and replacing an existing constitution, they can be seen as a vital step in the very establishment of the new state and/or constitutional order. Whereas contained constitutional referendums are at most ‘constitution-changing’ in their effect and therefore internal to the constitution, constitutive referendums are ‘constitution-framing’ and in some sense external to the existing constitutional order, even though the referendum may be organised within, and hence in its origin, under the authority of the internal processes of the constitution. Examples include the referendums involved in the making of a new constitution (Iraq 2005) or a new state (Eritrea 1993, East Timor 1999, Montenegro 2006, South Sudan 2011); each was categorically distinct from contained referendums, as a popular constitutive act which brought about a new legal order.

The importance of constitutive referendums for constitutional theory is not only in the significant role they play in helping to author a new legal order, but in how they relate in fact to a normative break that can be very hard to explain. If a referendum derives from one legal order, but has the power to supplant that order with a new order, where does such a referendum derive the legitimacy to do so, given the extent to which modern constitutionalism is so beholden to the very concept of constitutional supremacy?

In this light the constitutive referendum is in fact tied to a key paradox of modern constitutionalism: the issue of bootstrapping. A new constitution emerges, but from where does it derive its authority? If it were the case that it merely stems from the existing

constitution, then there would in fact not really be a new constitution or polity at all; the ‘new’ constitution would remain contingent upon the authority contained in the old constitution and would never assume an independent source of original authority. The narrative of American constitutionalism clearly rejected this notion. The constitution that emerged in Philadelphia was approved in a way that was illegitimate under the existing Articles of Confederation. But the acceptance of the constitution by the 13 states, including those who had not voted for its ratification, led to the emergence of the new order in fact and, ultimately, in law.

The origins of the American constitution, and of modern democratic constitutions since, have been legitimised as an act of ‘the people’ as a constituent body, albeit in this first case, acting through their representatives.² What we see here is the emergence of popular sovereignty as the source of legitimacy of a new legal order. While no referendum was held to ratify the Philadelphia constitution, the link between popular acceptance and constitutional legitimacy was clear to Madison and others.³

For us, there is another central issue therefore in constituent referendums. Such a referendum is not only constitutive in the legal-normative sense (that is, in creating a new legal order), it also serves the function of endowing the new order, including where this order emerges from a normative break between old and new constitutional orders – with the popular legitimacy that has come to be seen as the badge of validity for modern democratic constitutionalism.

² We leave aside the federal issue for now. For discussion of the neglect of the federal dimension of American constitutional origins see. Alison L. LaCroix, *The Ideological Origins of American Federalism* (Cambridge, Mass.: Harvard University Press, 2011).

³ The Federalist Papers, No.10, *The Federalist Papers*, (Clinton Rossiter ed.) (New York: New American Library, 1961), 78.

This conception of the popular role in the legitimization of legal rule also informs how we need to think about sovereignty. In the modern era, there has been a tendency for sovereignty to be viewed in narrow positivist terms as simply a matter of command. Sovereignty is ultimate power, the power to order or control, and the issue for constitutionalists is simply to find its locus: who within a constitutional system has the last word? In fact, the symbiotic relationship between sovereignty and popular legitimization demonstrates how this account is insufficient and that sovereignty must be understood in the context of constitutional foundations. That is, constitutions derive their legal authority from initial political legitimisation from the people.

Placing sovereignty within the context of constitutional foundations, leads us to Kalyvas' distinction between 'command sovereignty' and 'constituent sovereignty' (2004, pp.223-224). The former is the classical model of the final word, central to modernist accounts of the legal system as *Rechtsstaat*. Constitutional thinking about state-building in the modern era has often been conceptualised, for example by Kelsen (1967), with an eye to an absolute and final arbiter. The sovereign is characterised as the one who 'has the sovereign right of imposing any commands he pleases' (de Spinoza, 1951, 207). The constituent dimension has been underplayed. For Kalyvas, constituent sovereignty is concerned not with 'coercive power,' but rather with 'constituting power':

Thus, contrary to the paradigm of the sovereign command that invites personification and can better be exercised by an individual who represents and embodies the unity of authority – from the ancient imperatore to the king to the modern executive – the constituent power points at the collective, intersubjective, and impersonal attributes of sovereignty, at its cooperative, public dimension (Kalyvas, 2004, pp.235-236).

For Kalyvas, the sovereign becomes a more complex and multi-faceted concept, encapsulated in the idea of the 'constituent subject' who helps form not only the governmental structure of

a community but also its juridical and political identity(2004, p.256). In other words, this constituent subject is nothing less than the source of the constitution and of its authority.

In modern constitutional thought we see other subtle accounts of how sovereignty involves relational dimensions both between law and politics but also between the governed and government (Loughlin, 2003), or it is envisaged in essentially 'reflexive' terms between constituent power and constituted form (Lindahl, 2007). In this way we need to conceive the constitutive referendum in terms of the vital role of the people in 'constituting' a polity and hence as themselves the source of sovereignty, not only in its political dimension but also in its role as source of legal authority.

It is in the role of the people that we see the vital role played by the constitutive referendum as a vehicle. It is one thing to talk about a break in the legal order being legitimised by popular sovereignty, but this can be very abstract and hard to calibrate: when and how is this popular sovereignty manifested? The constitutive referendum fills this gap. As a polity-framing/constitution-framing referendum, the constitutive referendum allows for the manifestation of a people's direct democratic will, and hence of their capacity to act as the legitimising source of constitutional law in foundational constitutional acts. In this way the people act as original constitutional authors, bringing about a clear break in the old order; and, whether forming new states or new constitutions, they imbue the new construct with a new popular source of validity and authenticity.

There is a second way in which these referendums can be seen as 'constitutive'. If sovereignty is indeed relational or reflexive, then the relationship between the people and the new polity must be seen in deeply symbiotic terms. A new constitution or state is being created, but in this act of creation (and in the intimate involvement of the people in this creation), the people too can undergo processes of change and the very identity of the demos

can be implicated. It is widely recognised that any democratic constitution can come to embody the political selfhood of the people. In this sense, as well as serving the functional purpose of framing a system of government, the constitution can also take on a symbolic representational role by being ‘popular’ in orientation. It encapsulates the very identity of the people, while also embodying emblematically their collective settled will (Rosenfeld 2010).⁴ In turn, individuals come to identify with one another reflexively, through their shared commitment to this constitution. Constitutive referendums must therefore also be understood for their polity-building or nation-building potential. When referendums are used to make or re-create constitutions, they can themselves take on a vital nation-building role: through the direct engagement of the people in constituting the polity, they become themselves a key device in shaping the very identity of that polity and the political identities of its citizens.

Problems

The constitutive referendum in this way becomes a vehicle through which ‘the people’ can speak and determine. But how can these processes accommodate pluralism? In the situations we address, the very notion of who constitutes ‘the people’ can be deeply contested. The problems this raises can take place on many levels. One issue is whether the constitutive referendum can be adapted to deep multinational pluralism. In this paper, we are not addressing the use of referendums across a state. We have addressed this issue elsewhere, exploring whether ‘consociational referendums’ are feasible, and whether we can talk about the voters in such a referendum as ‘a public’, laying to the side the thicker and more contested term ‘people’ (Tierney, 2012).

Instead, in this paper we are concerned only with constitutive referendums among particular regions or sub-state peoples, where the ‘demos-framing’ issue is less pronounced. We acknowledge that the issue does not entirely disappear however, given the notion of nested identities, that is, people within the regions have citizenship and often strong identity ties to both the state and the regional levels. We recognise that there is also the issue of internal minorities within the region itself, including members of the ‘dominant’ national society of the state (Lecours and Nootens, 2009).

Regional citizenship in constitutional architecture

Of specific concern to us here are cases in which formal regional citizenship is an essential part of constitutional architecture of the state.⁵ This can be variously manifested and our focus is on the cases in which regional citizenship is: (1) used to represent a distinct people; and (2) legally codified either as a part of a constitution or post-conflict/independence/peace arrangement.

We understand this regional citizenship as people/demos formative. It can be based upon a distinct/separate legal citizenship framework (including formal registers of citizens), or exist as a type of overlapping citizenship regime – a citizenship constellation (Bauböck, 2010). Such a constellation of overlapping citizenship regimes can in a way construct a functional territory (Stjepanović, 2018). Cases such as ‘entity citizenship’ in Bosnia-Herzegovina (Štiks, 2011) and the Åland Islands *hembygdsrätt* (Suksi, 2011) would fall into

⁵ We understand there is a broader universe of cases similar to those included in the detailed comparison. Not so much for the reasons of the nature of the referendums held there but more importantly due to the lack of formal regional citizenship used in resolution of competing self-determination claims cases such as Catalonia are left out of the analysis. This is not to say that in some future constitutional arrangement between Madrid and Barcelona that might not be the case. Or, that some conclusions of this paper might not be applicable to the Catalan case, quite to the contrary. Hence, comparison with Catalonia could be the topic of some future study.

the first category, while the post-1998 Northern Ireland settlement (with the UK and Republic of Ireland citizenship regime overlap) would be an example of the latter.

We understand citizenship similarly to T.H. Marshall (1950), with civic, political, and social rights as its constitutive elements. Our emphasis here is on the political elements of citizenship, although it might be impossible to entirely separate them in everyday politics. The political element of citizenship can be rather broad and can include, for example, voting rights. Narrowing our scope, we here focus on political citizenship that is constitutive of a state-arrangement, i.e., that serves to define relations between state demoi.

Regional citizenship, in most cases, is understood to be qualitatively different from its state-wide counterpart. Passports, and international recognition are normally accorded to citizens of states, rather than to holders of regional citizenship. In rare cases, regional citizenship allows the holders to bear rights outside the country and to be recognised as a subject in inter-state relations. All of this fits into the traditional conception of ‘Westphalian sovereignty’ and its territorialised link to citizenship (Walker, 2017). Regional citizenship is thus considered as a simple derivative from state-wide citizenship in unitary and federal states. In confederal states or state unions, it is the member state citizenship that has primacy over the state union citizenship. Bauböck (2017, and in this Special Issue) advances this argument showing how (sub-state) regional and supranational (e.g., EU) citizenships are derivative of national citizenship: one is a European citizen due to one’s national citizenship of a member state. Federal state citizenship is substantially different from that in a confederal setting, in which the EU is used as a frequently quoted example. This can be illustrated by the fact that, for example, citizens of Austrian regions, derive both their membership in the said regional polity as well as their (confederal) EU citizenship from being citizens of the Austrian federation. The underlying principle is that, broadly conceived, hierarchically superior citizenship is linked to ‘the highest or strongest level of self-government. In a federal state,

this level will be the federal one; in a confederal union of states, it could well be the level of member states rather than that of the union' (Bauböck, 2017, 82). Apart from the supranational polity of the EU, there are very few, if any, existing empirical examples of a clear-cut confederal citizenship (excluding possibly Bosnia and Herzegovina). Conversely, federal citizenship is quite common (Maas, 2017). Arrighi and Lafleur recognise however, that there are some cases that do not fit entirely and are more exceptional or 'peculiar' cases (2017, p.6) resembling state citizenship. While agreeing with the above authors, it is precisely these, unusual, interstitial cases that we wish to explore below and which can shed light on the citizenship - constitutive referendum franchise.

The Åland Islands is such a case where a separate arrangement was put in place, following Finland's participation in the process of EU accession, to address the constitutional structure of Finland, where the *hembygdsrätt* or regional citizenship is an essential part of it.

There is an emerging literature dealing with hierarchy of citizenship in multilevel setting and the relations to territorially nested polities. In the much researched case of Bosnia and Herzegovina Sarajlić (2013) argues that (sub-state) 'entity'⁶ citizenship is used as a source of state citizenship (i.e., state citizenship is derivative of regional) since, for example, one could not become a naturalised Bosnian citizen without becoming a citizen of one of the entities.

Another example in the Bosnia-Herzegovinian context is the internal condominium of the Brčko District (see Stjepanović, 2015) where the international administrators imposed entity citizenship (against their will) on BiH citizen residents in Brčko who did not possess an entity citizenship in order for them to be able to exercise full political rights. However, one

⁶ In Bosnia and Herzegovina, sub-state units immediately below the state are called entities and there are two of them, the Federation of Bosnia and Herzegovina and *Republika Srpska*. There is a territory of the District of Brčko which formally belongs to both entities but is governed autonomously.

must be aware that definitions are politically contested. Bosnia or Cyprus are good examples. Claiming that Bosnia, or a future reunited Cyprus, is a confederation,⁷ or that state citizenship is derivative of the regional one, one might be considered a secessionist Serb (or Croat) nationalist in the former, or Turkish in the latter case (see also Krasniqi in this Special Issue). Hence, our intention here is to expose the complexity of the issue and to show that, perhaps, open-ended definitions of state territorial structure or regional citizenship are, in fact, tools for addressing competing self-determination claims.

Prominent cases such as Scotland and Catalonia, which ran independence referendums in 2014 and 2017 respectively (the legality of the latter currently being contested by the Spanish state), have attracted a lot of scholarly attention in recent years and they are indirectly relevant to our argument. Neither Catalonia, nor Scotland had a codified, formal regional citizenship prior to the referendum (for a detailed comparison of the two cases see Arrighi in this Special Issue). Moreover, neither exists as distinct territories as a result of a citizenship constellation between two sovereign states. The debate was mainly related to Scottish and Catalan emigrants (mostly within the respective host-states), as well as EU citizen residents within each region and their respective voting rights in the referendums. The debate revolving around these cases does have relevance for our argument, in that it frames the on-going debate on the implications on the franchise in relation to constitutive referendums. Arguably, the most extensive debate on the issue was held within the Robert Schuman Centre for Advanced Studies and its Global Citizenship Observatory - GLOBALCIT (formerly EUDO Citizenship). Two broad camps within the debate emerged (Ziegler, Shaw and Bauböck, 2014). The first camp resembling the all-affected principle, arguing that all future/potential citizens of an independent state should be given voting rights

⁷ For the debate over whether Bosnia and Herzegovina is a federation or a confederation, see Florian Bieber, 'Governing Post-War Bosnia-Herzegovina.' In Kinga Gal (Ed.), *Minority Governance in Europe* (ECMI, 2002).

in the referendum. The other camp, mainly supported by Bauböck (Ziegler et al., 2014, and in this Special Issue), sanctions the existing practices favouring continuity with the franchise used for elections prior to the referendum (where in the Scottish case,⁸ EU citizens were given voting rights, while that was not the case in Catalonia).

We want to take Bauböck's position further. While we concur with the importance of the stability and continuity of the franchise, our cases show regional citizenship is not simply relegated to the franchise in meso-tier elections. Two broad matters guide the normative conclusions of the paper – the stability and peoplehood/state arrangement and constitutional architecture. In some cases, regional citizenship is constituted through the citizenship constellation/ self-determination constellation such as in Northern Ireland, or as an overlap or a constellation of regional citizenships as in the case of the Brčko District of Bosnia and Herzegovina. However, the *depth* of the regional citizenship should also be allowed for when considering what constitutes state arrangement and peoplehood (both at state and sub-state levels). As much as it can be legally proscribed, citizenship is not always, and not necessarily, constitutive of the state arrangement.

Take, for example, the Soviet republican citizenship, normally accorded after a short period of residence, which had minor implications in terms of political rights during the Soviet period (Ginsburgs, 1983) but also equally limited significance for membership/citizenship in newly independent states coming out of the USSR (Grigas, 2016; Lohr, 2012) other than defining residency. The Baltic states of Estonia and Latvia went even further and completely ignored it in defining its citizenship post-independence, reverting to the interwar citizens registers as the foundation of new citizenry. This was unlike the Yugoslav context, wherein republican (regional) citizenship had some political implications

⁸ On the relations of the Scottish franchise in the two recent referendums (on independence of Scotland and the UK leaving the European Union) see Shaw (2016).

in terms of passive political rights during the Yugoslav period, but also had very strong implications in terms of the creation of citizenry following the break-up of the federal state(s). Further, in all Yugoslav successor states (save Kosovo), regional citizenship was used as a base for the formation of new citizenry post-independence, but more significantly for our debate, determined the franchise in the first multi-party elections and constitutive referendums of the 1990s.

The timing of the adoption of regional citizenship is oftentimes indicative of its purpose. If regional citizenship is negotiated as part of constitutional changes/establishment or soon after, it is indicative of the constitutive nature. However, in the Åland islands case, it is argued that:

a regional citizenship institution may [be] understood as preceding the additional linguistic and cultural guarantees proposed by the League of Nations rather than the other way around. This is an important explanatory factor for the relative success and stability of the Åland autonomy regime (Öst, 2016, p.223).

Similarly, the Annan plan for Cyprus, and the potential future constitution make explicit references to regional citizenship or internal constituent state citizenship. More specifically, the Annan plan states that:

Cypriot citizens residing abroad shall be afforded the internal constituent state citizenship status of the Greek Cypriot State if they or their forebears belonged to the Greek Cypriot community before 1974, or the internal constituent state citizenship status of the Turkish Cypriot State if they or their forebears belonged to the Turkish Cypriot community before 1974 (Annex II, Annan Plan 2004).

Internal citizens so defined have the right to approve the constitutional arrangement in a referendum. Hence, the peace plan defines dual peoplehood by reference to internal citizens

who then, have the powers to enact the constitution. It is worth noting that regional citizens in potential future scenario in Cyprus, carry their regional citizenship and associated rights irrespective of their residence.

Finally, in the case of Montenegro, regional citizenship, which was later translated into the citizenship of an independent state, preceded the constitutional order of 1992 (creating FR Yugoslavia) and that of the 2003 Constitutional Charter of Serbia and Montenegro. Referendums on independence were held in 1992 and 2006 (Džankić, 2011; Morrison, 2008), confirming the union with Serbia in the former case and ending it in the latter. Worth noting is that the terms of the referendum and franchise were clearly defined in the 2003 Constitutional Charter and precluded, unlike in the proposed Cypriot scenario, Montenegrin regional citizens residing in the other state member (Serbia) from voting in the referendum.

Citizenship-franchise nexus: Who should vote?

If a constitutive referendum is to be held, and given the potential of these referendums to shape the very sovereignty of the polity and the identity of its citizens, the stakes are high. It may be agreed that a referendum should take place within a particular territorial space (the regions with which we are concerned), but the issue of *who* is entitled to vote can raise its own problems. Two questions surrounding the eligibility of voters have created controversy: are there, or should there be, people among those resident within the territory who are not entitled to vote? And, are there people resident beyond the territory to whom, nonetheless, the extension of the franchise is warranted?

Bosnia Herzegovina's peace-agreement/constitution defines and regulates regional (entity) citizenship. Here, regional citizenship, together with other forms of consociationalism

and territorial autonomy, was a key instrument of post-conflict constitutional settlement. The constitution, however, does not explicitly regulate holding referendums. Although there was a referendum on independence held in 1992, the 1995 constitution does not include any reference to future referendums. Recent attempts by the Republika Srpska entity political leaders (in 2011 and 2016) to run a referendum on relatively insignificant issues show what a highly contentious issue it is since referendums in this context are closely connected to nation-and-demos building and by default strengthen ethnonational groupness.

Similarly, in the case of Finland and the Åland Island, referendums are not widely used and there is no general legislative competence with the Åland islands to organise advisory referendums. But, that possibility was specifically thought to exist in relation to Finland's EU membership and the effects supranational integration might have on the Islands' autonomy. Hence a referendum was held in 1994 using the franchise based on the Åland *hembygdsrätt*. As a person would keep his or her citizenship for five years after changing residence and emigrating from the island, a number of people who were not residents in the Islands had the right to vote in the advisory EU referendum that was held in the Åland Islands in 1994. This also applies to the right to vote in elections to the Legislative Assembly. In practice, this is done so that persons with the right to vote residing outside of the Åland Islands can cast their vote by post. In addition to this regional advisory referendum, the Åland Islanders also participated in the national EU-referendum.⁹ In case of a loss of regional citizenship due to an absence of five years, previous holders of *hembygdsrätt* can regain it immediately so long as they have spent at least half of their life living in the Islands.¹⁰

⁹ See also Markku Suksi, 2016, pp.84-111.

¹⁰ Mats Löfström, Åland Centre party MP, Finnish Parliament (electronic communication, 16 Nov 2017).

In the Montenegrin 2006 independence referendum and its legal sanction in the 2003 Constitutional Charter, the franchise in the referendum was referred to the Montenegrin election law. Consequently, Montenegrin citizens residing in Serbia were excluded from being able to vote in the referendum. This is worth reemphasising as the particular arrangement was discussed during the adoption of the Charter and could thus be seen as constitutive of the state architecture.

Demoi and the ‘founding-fathers principle’ as an addition to the referendum franchise debate

Owen (2012) emphasises the difference between distinct types of demoi and the role in democratic processes despite the fact that what he calls the ‘populus’ of the given territorial polity might be stable. Some of these include the discursive membership of the demos, which is those entitled to voice; or electoral demos, those with voting rights as well as the editorial membership of those entitled to contest the government decision. Similarly, we suggest demoi could be constituent (forming the polity), constitutive (having the power to form the policy) and the actually constituted demos.¹¹ Discounting for intergenerational change, most of the cases discussed here demonstrate a high degree of congruence between the relevant demoi. One of the reasons is obviously that citizenship is used alongside territorial restructuring as a way to address competing self-determination claims. Hence, changing the boundaries of multiple demoi that exist in every polity becomes a more politically and legally

¹¹ For a further detailed and critical examination of how ‘the people’ are conceived in political and legal debates, see Oklopčić (2018).

salient issue in the cases where citizenship becomes part of the panoply of conflict-resolution mechanisms.

Having outlined some of the key issues with regard to referendums in regions/states where regional citizenship is a part of the constitutive architecture of the state, we can make some observations. Rather than focusing on the all affected principle as the future citizens of a potentially independent state, the cases analysed here show the importance of the previous (or concomitant with the constitution-making moment) people-defining process by the means of regional citizenship. So much so that in some of the cases, such as Cyprus, the references to the peoples (i.e., regional citizens) reach back to 1974, the moment before the de facto disintegration of the state. Hence we can propose that regional citizenship plays an important role in these cases based on a ‘founding-fathers principle’. That is, there is a realisation that in order to negotiate a peace-agreement, or establish a new constitutional order, in complex (multi/pluri-national) states, a recognition of self-determination claims to peoplehood must be fulfilled. This would, by extension, warrant extending the franchise in constitutive referendums (beyond the existing regional franchise) to include regional citizens irrespective of their residence. However, as the cases of the Åland Islands and Montenegro show, this could be limited in various ways – either by time, as in the Åland Islands, or entirely suspended as in Montenegro - as long as these are a part of the constitutional arrangement.

What the above analysis shows is that rather than assuming there is an ideal type of territorial structure and citizenship congruence, much depends upon circumstances. In ideal type federations, regional citizenship is derivative. In ideal type confederations, the opposite is true. The cases dealt with here indicate a staggered relation and processes that may or may not change over time. In the Åland Islands case, the citizenship / territorial regime is stable

over time and accepted. In Bosnia, it is highly contested and there are strong tendencies to transform it along either federal or confederal principles. In the Montenegrin case, we have seen a simultaneous evolution of citizenship towards a confederal (subsequent independence) model. The relationship between self-determination, constitutional design and franchise is always contingent upon a symbiotic interplay between the people involved, the nature of the territory, the circumstances from which the constitution emerges and the political background against which fundamental, constitution-forming decisions are taken. The notion of ‘affected’ can be multi-layered and needs to be addressed case by case. If we consider the relevant body of participants to be a ‘public’ affected by or interested in the outcome, rather than falling back on a priori definitions of citizenship, we can also find more imaginative resources with which to promote inclusion and responsiveness. The potential for stability in the settlement or constitutional outcome seems likely to be enhanced by such a nuanced approach.

What our cases show is that there is a staggered process that is often being made that may result in (1) citizenship and territorial hierarchy convergence; (2) state separation/confederalisation; or (3) status quo (very likely/desired in the immediate post-conflict period). Context matters obviously. A situation of limited autonomy such as the Åland Islands enjoy appears to be more readily accepted with its ‘peculiarities’ than Bosnia where the existence of the entire state is at stake.

Some of the problems involve how to define franchise in constitutive referendums in these cases. The obvious answer is - not in the same way as in usual regional elections. The question of franchise takes on a particular salience when the issue at stake is itself foundational. The issue is not just who is affected, but how they are affected and for how long. A referendum that can determine the founding of a state or a constitution has the potential to create a long-lasting settlement that will outlive its participants. On this basis, participants take on a representational role. That is, they are not only voting for themselves

and their families, but for future generations. In doing so, they are also asserting themselves as a collective 'we' who lay claim on the inter-generational collective basis to the territory concerned, or at least to some lasting influence over it. This can lead to very fraught arguments about who the franchise should belong to, given that it seems to collapse into an essentialist conception of 'the people'.

These arguments can be avoided if the very idea of 'the people' is left at the door. In a situation of conflict, the voters may come together not as one people, but as different peoples who may in fact contest the sovereignty of the territory. But when the referendum is held upon a peace settlement, or a contingent governmental arrangement, then they may be willing to vote together as 'a public', leaving to the side the more dramatic and contentious notion of peoplehood. As a contingent people, unified in that moment of voting on one issue, on a governmental arrangement which is not presented as a final say on the sovereignty of the territory, but which leaves that issue open to later discussion within the context of the new power-sharing arrangement. Such was very much the story of the referendum on the Belfast Agreement. Unionists and nationalists agreed to the settlement and also endorsed it in a referendum. They appealed to support for the deal even though each side had very different ideas of peoplehood, of sovereignty and very different long-term goals for the territory. The result was that the whole population voted as a public without renouncing their respective sense of British or Irish peoplehood. As such, the franchise itself was not so controversial. The deal was also endorsed implicitly by the wider franchise of the British people through Parliament, and by the wider Irish people in a separate referendum. In none of these processes were fundamental sovereignty claims made (in fact in the Irish referendum the conational claim to Northern Ireland was effectively renounced). The franchise in Northern Ireland was therefore not controversial because the referendum was not about peoplehood per

se, but rather about leaving peoplehood in abeyance and voting on a residential basis as a public.

Conclusion

As said earlier, we believe characterisation of regional, its role in constitutional architecture and self-determination conflicts needs to be spelt out before making any conclusions. Bosnia and Herzegovina is an example of regional citizenship being used in peace agreement as a concession to centrifugal demands and as a balance to coming-together federalism (alongside strong consociational mechanisms). Cyprus, as envisaged by the Annan plan would follow a similar logic. Åland Islands would share most of the traits of the last two cases but without a history of violent conflict. In these cases, we can expect a more firm definition or relations between regional citizenship and the founding demos.¹² Acquisition of regional citizenship and extension of voting rights to recent residents in this type of cases might be more contested politically, as it might touch upon foundational issues. Montenegro is an example of evolution of regional citizenship starting under Yugoslav rule, gaining some importance in the first referendum but reaching confederal nature in the Constitutional Charter of Serbia and Montenegro. In Northern Ireland, despite the post-conflict setting similar to Bosnia and Cyprus, the citizenship constellation emphasises the recognition of an existing situation an evolution of the entanglement of ROI and UK citizenship rather than a strong conflict resolution mechanisms.

So, what should the relation between constitutive referendums and regional citizenship in our cases look like? It is fair to conclude that the franchise has to be defined in a nuanced, case by

¹² Comparable principles were applied in the definition of the ‘special electoral roll for referendums’ [*liste électorale spéciale*] in New Caledonia (see MacLellan, 1999).

case approach. Regional citizenship can certainly complicate constitutive referendums. In obvious cases where regional citizenship is simply derived from the state-wide citizenship, the franchise is less problematic. Further, in many of our cases citizenship is an essential part of demos-creating peace agreement process. Hence, in cases of citizenship used for post-conflict settlement, the constituting demos corresponds more closely to a constitutive referendum franchise. Issues of intergenerational solidarity and the nature of the peace process / integration are at stake here.

There are obvious limitations of these models, the Åland Islands and Bosnia and Herzegovina show deficiencies in accommodating migrants beyond the boundaries of the polity or those that do not belong to the constitutive demos (see the *Sejdić-Finci* case)¹³. Similar issues are stumbling blocks in Cyprus, primarily relating to post-1974 Turkish settlers in the north of the island. This is rather obvious and has been analysed elsewhere. However, one ought to remember why these rigid types of regional citizenship emphasising the original demos were put in place in the first instance. There is no simple solution to this conundrum. Hierarchy of citizenship (whether regional or state-wide) is derivative of the nature of the state architecture (whether the state is federal or confederal) are key ingredients of highly politicised debates in many post-conflict societies.

What the cases indicate is that there are two approaches to dealing with the problem. The one is to consciously obscure either or both the hierarchy of citizenship and the nature of the state architecture as is done, for example, in Bosnia and Herzegovina. The other model seems to be the idea of public as a way of leaving the more divisive national questions to one side where this is possible. Northern Ireland, despite of its shortcomings is a good example or

¹³ *Sejdić and Finci v Bosnia and Herzegovina*, Application nos. 27996/06 and 34836/06, judgment of the Grand Chamber of 22 December 2009.

that. In the end, the franchise needs to follow local conditions, be responsive and be inclusive.

Bibliography

Annan Plan for Cyprus, 2004. *Constitutional law on internal constituent state citizenship*.

Retrieved from

http://www.hri.org/docs/annan/AnnexII/AnIIAt3_Constitutional_Law_on_Internal_Constituent_State_Cit.pdf (last accessed 20 April 2018).

Arrighi, J-T. & Lafleur, J-M. (2017). Where and why can expatriates vote in regional elections? A comparative analysis of regional electoral practices in Europe and North America. *Journal of Ethnic and Migration Studies*, volume(edition), 1-22.

Bauböck, R. (2010). Studying citizenship constellations. *Journal of Ethnic and Migration Studies*, 36(5), 847-59.

Bieber, F. (2002). Governing post-war Bosnia-Herzegovina. In K. Gal (Ed.), *Minority Governance in Europe* (pp. 319-339). Flensburg, Germany: Local Government Institute and European Centre for Minority Issues.

Brubaker, R. (1996). *Nationalism reframed: Nationhood and the national question in the new Europe*. Cambridge, UK: Cambridge University Press.

Džankić, J. (2012). Understanding Montenegrin citizenship. *Citizenship Studies*, 16(3-4), 337–351. <https://doi.org/10.1080/13621025.2012.683178>

‘Guidelines for Constitutional Referendums at National Level’, European Commission for Democracy Through Law (Venice Commission) (2001).

- Grigas, A. (2016). *Beyond Crimea: The new Russian empire*. New Haven, CT: Yale University Press.
- Loughlin, M. (2003) *The Idea of Public Law*. Oxford: Oxford University Press.
- Lohr, E. (2012). *Russian citizenship: From empire to Soviet Union*. Cambridge, MA: Harvard University Press.
- Ginsburgs, G. (1983). *Citizenship law of the USSR*. Dordrecht, Netherlands: Springer.
- Kalyvas, A. (2005) Popular sovereignty, democracy and constituent power. *Constellations*, 12(2), 223-244.
- Kelsen, H. (1967). *The pure theory of law* (M. Knight, Trans.). Berkeley, CA: University of California.
- Lecours, A. and G. Nootens, eds. (2009). *Dominant Nationalism, Dominant Ethnicity: Identity, Federalism and Democracy*. Brussels: Peter Lang.
- Lindahl, H. (2007). 'Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood' in Martin Loughlin and Neil Walker, *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*. Oxford: Oxford University Press. (pp. 9-24)
- Maas, W. (2017). Multilevel citizenship. In A. Shachar, R. Bauböck, I. Bloemraad, and M. Vink (Eds.), *The Oxford handbook of citizenship* (pp.644-668). Oxford, UK: Oxford University Press.
- MacLellan, N. (1999). The Noumea Accord and Decolonisation in New Caledonia. *The Journal of Pacific History* 34, 245–252.
- Morrison, K. (2009). *Montenegro: a modern history*. London: I.B. Tauris.
- Oklopčić, Z. (2018). *Beyond the People: Social Imaginary and Constituent Imagination*, Oxford Constitutional Theory. Oxford, New York: Oxford University Press.

Öst, H. (2016). The concept of the Åland Islands' regional citizenship and its impact on the inclusion of migrants. *European Yearbook of Minority Issues Online*, 13(1), 220–32.

Owen D. (2012). Constituting the polity, constituting the demos: On the place of the all affected interests principle in democratic theory and in resolving the democratic boundary problem, *Ethics & Global Politics*, 5(3), 129-152,

Rosenfeld, M. (2010). *The identity of the constitutional subject: Selfhood, citizenship, culture and community*. Abingdon, UK and New York, NY: Routledge.

Sarajlić, E. (2013). Multilevel citizenship and the contested statehood of Bosnia and Herzegovina. In W. Mass (Ed.), *Multilevel Citizenship* (pp.168-183). Philadelphia, PN: University of Pennsylvania Press.

Shaw, J. (2016), Unions and citizens: Membership status and political rights in Scotland, the UK and the EU. In C. Closa (Ed.), *Secession from a member state and withdrawal from the European Union: Troubled membership*. Cambridge, UK: Cambridge University Press.

de Spinoza, B. (1951). *A theologico-political treatise* (R.H.M. Elwes, Trans.) Dover 1951).

Stjepanović, D. (2015). Dual sub-state citizenship as institutional innovation: The case of Bosnia's Brčko district. *Nationalism and Ethnic Politics*, 21(4), 379-400.

Stjepanović, D. (2018). *Self-determination constellations: Sub-state regions and citizenship in Europe*. In J. Jordana, M. Keating, A. Marx and J. Wouters (eds.) *Borders, sovereignty and self-determination in contemporary Europe* (Abingdon: Routledge).

Suksi, M. (2011). *Sub-state governance through territorial autonomy: A comparative study in constitutional law of powers, procedures and institutions*, Berlin, Germany: Springer-Verlag.

Suksi, M. (2016). The Referendum as an instrument for the resolution of territorial disputes and for the exercise of self-determination. In P. Hilpold (Ed.), *Autonomie und selbstbestimmung im Europa und im internationalen vergleich* [Autonomy and self-determination in Europe and in international comparison] (pp.84-111). Vienna, Austria: Nomos.

Tierney, S. (2012). *Constitutional Referendums; The Theory and Practice of Republican Deliberation*, (Oxford University Press).

Tierney, S. (2009) “Constitutional Referendums: A theoretical enquiry” (2009) *Modern Law Review* 360-383.

Walker, N. (2017). The place of territory in citizenship. In A. Shachar, R. Bauböck, I. Bloemraad, and M. Vink (Eds.), *The Oxford handbook of citizenship* (pp.553-575). Oxford, UK: Oxford University Press.

Ziegler, R., Shaw, J., Bauböck, R. (2014). Independence referendums: Who should vote and who should be offered citizenship? (Research Paper no.90). Florence, Italy: Robert Schuman Centre for Advanced Studies and European University Institute.